No. 11,573

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALEXANDER STEELE,

Appellant,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, and ALFRED J. FRITZ and ROBERT McWILLIAMS, as Judges thereof,

Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

Appellant sought in the Court below to have a criminal action removed to the United States District Court for trial allegedly pursuant to the provisions of section 31 of the *Judicial Code*. (*U.S.C.A.*, Title 28, sec. 74.) The Court granted appellees' motion to dismiss from which order the appellant is prosecuting this appeal. Pending the appeal the Court below has granted an injunction staying the prosecution of the criminal action pending the appeal.

This case is but an attempt to use the federal judicial system after the manner of a demurrer, motion or other dilatory plea in order to postpone the prosecution of an affluent defendant in a criminal action pending in a State Court.

STATEMENT OF THE PLEADINGS AND FACTS.

1. Jurisdiction.

Appellant claims that his case is one to redress the deprivation of a constitutional right, i.e. "due process of law" and that the District Court has jurisdiction under Title 28 *U.S.C.A.*, section 41(15) (*Judicial Code*, sec. 23(14)) and, that the criminal action pending in the State Court is therefore removable under the provisions of Title 28 *U.S.C.A.*, section 74. (*Judicial Code*, sec. 31.)

Appellate jurisdiction depends (according to appellant) on Title 28 *U.S.C.A.*, section 225. (*Judicial Code*, sec. 128.)

2. Statement of pleadings and facts.

There was no issue of fact or trial in the Court below. A motion to dismiss was granted. All facts set out in this statement have been taken from appellant's bill of complaint and the papers attached thereo.

Appellant was informed against by the District Attorney of the City and County of San Francisco on three felony counts for violations of section 337a

of the *Penal Code* of the State of California. (R. 2, 22.) In short he was charged with being a "bookmaker" and violating the gambling laws.

He entered a plea of not guilty and his case was set for trial. (R. 4.)

On August 24, 1946 he filed a petition for the removal of the criminal action to the United States District Court for trial pursuant to the provisions of Title 28 *U.S.C.A.*, section 74. (*Judicial Code,* sec. 31.) (R. 4, 11.)

Appellant complains that the State Court will, unless restrained, proceed to try him on the "bookmaking" charges (R. 7) and that in that event he will have no plain, speedy or adequate remedy at law.

Appellant attaches to his petition the papers in the criminal action which he sought to remove from which the following facts appear:

Appellant was on June 13, 1946 charged in the State of California with a violation of section 337a, *Penal Code.* (R. 23.) On July 19, 1946 he made a motion in the criminal case for the return of certain seized property and the suppression of evidence. The motion is signed by counsel and is unverified by appellant or any other person. (R. 25.) The motion was denied. (R. 17.)

The petition for removal alleges that the trial of the criminal action will proceed and that appellant will not be afforded due process of law because evidence which was allegedly illegally seized will be used

against him, all in violation of the rights guaranteed to him under the 14th Amendment to the *Constitution of the United States.* (R. 21.)

Appellees moved to dismiss the proceeding and to remand the criminal action. (R. 29.) The motion was granted on February 25, 1947. (R. 31.)

An appeal was taken by appellant on March 12, 1947. (R. 32.) On March 13, 1947, the District Court issued an order staying the prosecution of the criminal case pending this appeal.

ARGUMENT.

1. THE DOCKETING OF THE PETITION FOR THE REMOVAL OF THE CAUSE TO THE UNITED STATES DISTRICT COURT DID NOT CONFER JURISDICTION ON IT.

It is apparently the contention of appellant that by his act of carrying the papers to the Federal Court and there "docketing" them, he thereupon divested the Superior Court of all jurisdiction in the matter and conferred jurisdiction upon the Federal Court. This action is not new for the same point was commented upon in the case of *People of the State of California v. Lamson,* 80 F. (2d) 388, which held adversely to appellant, and where Mr. Friedman was counsel for complainant. The Ninth Circuit, speaking through Mr. Justice Wilbur, stated:

> "Petitioner's contention that there has been an automatic removal of the cause from the state to the federal court has been long settled adversely to his contention."

Judge Wilbur continues reciting with approval from the case of *Stommel v. Timbrell,* 84 Iowa 336, where the Court stated with reference to a similar application:

> "The law is that a state court does not lose jurisdiction by the filing of a petition for removal, unless the petition shows upon its face that the case is removable. 'The state court is not required to let go its jurisdiction until a case is made which upon its face shows that the petitioner can remove as a matter of right.' "

And, again, Judge Wilbur, citing *Ex parte State of Alabama,* 71 Ala. 363, pointed out that that Court said:

> "The jurisdiction of the State court is not ousted by a mere application for the removal of a civil cause, or of a criminal prosecution to a Federal court. It is only when the application is in proper form, conforms to the act of Congress authorizing the removal, stating facts bringing the case within the provisions of the act, that it becomes the duty of the State court to yield obedience to the paramount law, and to cease the exercise of its original jurisdiction * * *"

As indicated in *Lamson v. Superior Court,* 12 F. Supp. 812, the complaint must contain allegations of fact from which it would appear the Court is justified in granting the relief prayed for. The mere docketing of the record does not constitute an automatic removal of the cause.

In *People of the State of California v. Lamson,* 12 F. Supp. 813, at page 817, Judge St. Sure said:

> "The persistent effort to pitchfork this prosecution into the federal courts must be attributed to the blind zeal of the attorneys for the accused, for it has no justification in law. The proper judicial tribunal for the trial of the accused is within the jurisdiction of the state of California, where the criminal prosecution is pending, and where it should remain until final judgment."

It is of interest to note that Mr. Friedman acted as counsel in both the *Lamson* decisions above cited.

In *Southern Pacific Co. v. Haight,* 126 F. (2d) 900 (Ninth Circuit), this Court, quoting from *Madisonville Traction Co. v. St. Bernard Mining Co.,* 196 U. S. 239, 244, said at page 903:

> " 'It is well settled that if, upon the face of the record, including the petition for removal, a suit does not appear to be a removable one then the state court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made.' "

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2. **THE INTRODUCTION OF EVIDENCE ALLEGEDLY OBTAINED THROUGH UNLAWFUL SEARCH AND SEIZURE IN THE STATE COURT DOES NOT IMPINGE UPON THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.**

It has long and consistently been held that the provisions of the Fourth Amendment to the *Federal Constitution* with respect to search and seizure are limita-

tions upon the Federal Courts only and do not apply to State procedure. Nor can it be read into the Fourteenth Amendment to the Federal Constitution. A most comprehensive expression of this doctrine is found in *People v. Mayen,* 188 Cal. 237, at page 241, which reads:

> "All consideration of the application of the federal constitution to this case may be at once eliminated, as it is well settled that the fourth amendment to the constitution of the United States, relating to searches and seizures, only applies to the federal government and its agencies. (Weeks v. United States, 232 U.S. 383 (Ann. Cas. 1915C, 1177, L.R.A. 1915B, 834, 58 L.Ed. 652, 34 Sup. Ct. Rep. 341, see, also, Rose's U. S. Notes); State v. Peterson, 27 Wyo. 185 (13 A.L.R. 1284, 194 Pac. 342); Gindrat v. People, 138 Ill. 103 (27 N. E. 1085).) In the Weeks matter it was held that even where the matter was pending in the federal court, the unlawful search and seizure having been made before the finding of the indictment, and not by an officer of that court, the provisions of the constitution could not be invoked against the evidence so procured. Consequently, the rule adopted by the United States courts is not controlling authority here and is not necessarily applicable in principle to the interpretation of the state constitution on this point."

On page 243 the State Supreme Court continues:

> "There is no rule better established or more universally recognized by the courts than that where competent evidence is produced on a trial the courts will not stop to inquire or investigate

the source from whence it comes or the means by which it was obtained.

"There is no need to elaborate this proposition. The general rule is thus stated by Greenleaf (1 Greenleaf on Evidence, sec. 254): 'Though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice of how they were obtained, whether lawfully, or unlawfully, nor will it form an issue to determine that question;' "

Indeed, the rule announced in the *Mayen* case is admitted by counsel for appellant to be the rule in this State which the State Supreme Court has consistently followed.

See:

Parker v. Board of Dental Examiners, 216 Cal. 285, 300;

Herrscher v. State Bar, 4 Cal. (2d) 399, 412;

People v. Gonzales, 20 Cal. (2d) 165 (cert. denied by U. S. Supreme Court, 317 U. S. 657, and rehearing denied 317 U. S. 708);

People v. Kelley, 22 Cal. (2d) 169.

In the *Kelley* case, the last utterance, as far as we can find in this State, it is said on page 173:

"In the recent case of People v. Gonzales, supra, the California cases involving the admissibility of evidence obtained by unlawful search and seizure

were reviewed, and the court considered the question whether the use of evidence so secured was a denial of due process of law guaranteed by the Fourteenth Amendment. It was concluded that the use of evidence obtained through an illegal search and seizure does not violate due process of law because it does not affect the fairness or impartiality of the trial. The fact that an officer acted improperly in securing evidence presented against a defendant does not prevent the court from rendering a fair and impartial judgment.

"This decision is determinative of the contentions made by the appellant to the contrary, although it is not a complete answer to the problem. For in the present case, because the challenged evidence consists of the reports of telephone conversations, a broader question is presented, requiring a construction of the Federal Communications Act (Supra)."

That the Fourth Amendment to the *Federal Constitution* has no application to State procedure, see:

National Safe Deposit Company v. Illinois, 232 U. S. 58, 71;

Ohio ex rel. Lloyd v. Dollison, 194 U. S. 445, 447;

U. S. v. Smith, 23 F. Supp. 528;

Taylor v. Hudspeth, 113 F. (2d) 825;

Rettich v. U. S., 84 F. (2d) 118.

Evidence which is obtained through unlawful search and seizure is not for that reason the less trustworthy, nor does the State Constitution contain any specific provision against the use of such evidence in the trial

of a criminal case. As indicated in *People v. Gonzales,* 20 Cal. (2d) 165, at page 169, the only recourse that the defendant may have is in civil and criminal remedies directly against the officers for their illegal acts.

It is of interest to note that Mr. Friedman was counsel in the *Gonzales* case. In the case of *People v. Gonzales,* 20 Cal. (2d) 165, Mr. Friedman, counsel in the instant case, made the same point that he makes in this case, i.e., that the use in evidence of matters obtained by an illegal search was a deprivation of due process of law and in violation of the accused's rights under the Fourth and Fourteenth Amendments to the *Constitution of the United States.* In disposing of this contention the Supreme Court of California said:

> "While the United States Supreme Court has held that the due process clause includes the guarantee of the Fifth Amendment against compulsory self-incrimination to the extent that the Amendment forbids the use of a confession obtained by coercion or torture (Chambers v. Florida, supra; Brown v. Mississippi, supra; Lisenba v. California, supra. See Bram v. United States, 168 U. S. 532 [18 S. Ct. 183, 42 L. Ed. 568]), it has done so because a confession obtained by coercion or torture is so unreliable that its use violates all concepts of fairness and justice. (Chambers v. Florida, supra; Brown v. Mississippi, supra; Lisenba v. California, supra; cf. Twining v. New Jersey, supra.) The use of evidence obtained through an illegal search and seizure, however, does not violate due process of law for it does not affect the fairness or impartiality of the trial. (People v. Defore, 242 N. Y. 13 [150 N. E. 585];

People v. Mayen, supra; Com. v. Donnelly, 246 Mass. 507 [141 N. E. 500]; Johnson v. State, 152 Ga. 271 [109 S. E. 662, 19 A.L.R. 641].) The fact that an officer acted improperly in obtaining evidence presented at the trial in no way precludes the court from rendering a fair and impartial judgment. It has long been an established rule of evidence that 'the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence.' (8 Wigmore, Evidence (3rd ed.), sec. 2183, p. 5, and cases there cited.)"

Peo. v. Gonzales, 20 Cal. (2d) 165, 170.

Counsel then took the *Gonzales* case to the Supreme Court of the United States and presented to that Court the very point urged here. Certiorari was denied. (*Gonzales v. California,* 317 U. S. 657, 87 L. Ed. 528; 317 U. S. 708, 87 L. Ed. 564.)

Even if the criminal action was removable to the Federal Court it is difficult to see what advantage could be gained by appellant. The evidence gathered by the San Francisco police and denounced by appellant as against the rule of unreasonable searches and seizures would still be legally admissible in the trial of the case in the Federal Court, since this evidence was secured by members of the police department of the City of San Francisco in which no federal officer participated. Thus, in *Feldman v. United States,* 322 U. S. 487, at page 492:

"And so, while evidence secured through unreasonable search and seizure by federal officials is inadmissible in a federal prosecution, Weeks v.

United States, supra; Gouled v. United States, 255 U. S. 298; Agnello v. United States, 269 U. S. 20, incriminating documents so secured by state officials without participation by federal officials but turned over for their use are admissible in a federal prosecution. Burdeau v. McDowell, 256 U. S. 465. Relevant testimony is not barred from use in a criminal trial in a federal court unless wrongfully acquired by federal officials."

See also:

Byars v. United States, 273 U. S. 28, 33.

The fact that the rule laid down by the Supreme Court of the State of California applies to all alike, does not violate the section of the Constitution against the equal protection of the laws.

And the fact that section 19 of Article I of the *State Constitution* reads substantially as does the Fourth Amendment, and that its application has been construed by the Supreme Court of the State of California in a manner contrary to that of the Federal Courts on the Fourth Amendment to the *United States Constitution,* cannot avail appellant. The construction of the Constitution and the statutes of the State of California by the Courts of that State are binding upon the Federal Courts.

La. v. Resweber, et al. (Jan. 13, 1947), Vol. 67, No. 5, page 374, S. Ct. Rep. Adv. Ops.;

Carter v. Illinois, Vol. 91, No. 3, page 157, L. Ed. Adv. Ops.;

Buchalter v. New York, 319 U. S. 427.

3. THE ORDER OF THE UNITED STATES DISTRICT COURT DISMISSING THE COMPLAINT IS NOT APPEALABLE.

The order of the United States District Court dismissing the complaint is conclusive, from which an appeal may not be taken.

Kloeb v. Armour & Co., 311 U. S. 199;
Yankaus v. Feltenstein, et al., 244 U. S. 127;
Wabash Ry. Co. v. Lindley, 29 F. (2d) 829;
Atchison T. & S. F. Ry. Co. v. Smith, 47 F. (2d) 223;
U. S. v. Fixico, et al., 115 F. (2d) 389;
U. S. v. Johnson, 116 F. (2d) 501;
Haney v. Wilcheck, 38 F. Supp. 345;
28 *U.S.C.A.*, sec. 71.

CONCLUSION.

It is submitted that the pleadings of petitioner contain no allegations upon which to base the removal of the cause to the Federal Court; that the proper tribunal for the trial of the criminal charge is the State Court from which removal is sought and which affords appellant a complete and adequate remedy at law. In the event the State Courts find adversely to him, he may again test the matter out in the United States Supreme Court. It appears that appellant seeks by this appeal to overthrow a long line of decisions by the Federal Courts and the United States Supreme Court holding the Fourth Amendment to the *Federal Constitution* has no application to State procedure. Mr. Friedman, counsel for appellant, carried

the point to the United States Supreme Court by certiorari in *People v. Gonzales,* supra, which was there twice denied.

The appeal should be dismissed, the injunction declared void, or dissolved, and the cause remanded to the State Court for trial, where it belongs.

Dated, San Francisco,
September 16, 1947.

Respectfully submitted,
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